Supreme Court, U.S.
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In The

Supreme Court of the United States

FRANK A. WHITESIDES,

Petitioner,

v.

STATE OF ALASKA,
Department of Public Safety,
Division of Motor Vehicles,

Respondent.

On Petition For Writ Of Certiorari To The Alaska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the State of Alaska violate Whitesides's due process rights under the Due Process Clause when, on an officer's report that he refused to take a breath test (following arrest for driving while intoxicated), its Division of Motor Vehicles revoked his driver's license and scheduled an administrative hearing for over eight months after arrest, prejudice having occurred when the arresting officer, testifying, could not recall an important detail?

2. Did the State of Alaska violate Whitesides's due process rights in conducting the administrative hearing, when contrary to an Alaska statute the Department of Public Safety had not promulgated regulations governing the conduct of administrative license revocation hearings?

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OPINIONS AND ORDERS BELOW

The opinion of the Alaska Supreme Court is published at: *Whitesides v. State, Department of Public Safety*, 20 P.3d 1130 (Alaska 2001). It is reprinted herein in its slip opinion form (Op. No. 5388, dated April 13, 2001) at App. 1-28. No petition for rehearing was filed.

The decision on administrative appeal by the Ketchikan Superior Court, dated October 2, 1997, affirmed the Division of Motor Vehicles's (DMV) revocation of Whitesides's driver's license. This decision appears at App. 29-36. The decision is unpublished.

By order of October 25, 1996, the DMV hearing officer affirmed the Notice and Order of Revocation of January 28, 1996. The hearing officer ordered Whitesides's driver's license revoked for one year.

In a separate but related proceeding, Whitesides was charged with misdemeanor counts of driving while intoxicated (DWI) and refusal to take a breath test, *State of Alaska v. Whitesides*, No. 1KE-96-99 CR, in Ketchikan District Court. In September 1996, these charges were dismissed by the District Attorney. *See* App. 6, 30.

STATEMENT OF JURISDICTION

The judgment of the Alaska Supreme Court was entered on April 13, 2001. The jurisdiction of this court is invoked pursuant to 28 USC § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment of the United States Constitution provides in part:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Alaska Statute (AS) 28.05.141(a) is reproduced at App. 37.

AS 28.15.165 is reproduced in its entirety at App. 37-40.

AS 28.15.166 is reproduced in its entirety at App. 40-45.

STATEMENT OF THE CASE

On January 28, 1996, Frank A. Whitesides and his companion drove to downtown Ketchikan to have some drinks and watch the Super Bowl. The two had plans to stay at a friend's apartment that night. Whitesides had a key to the apartment, but not the key card to get into the building. They waited in the truck they took to town until the friend would be available around 11:00 p.m. It was cold, and Whitesides started the truck to run the heater. The two fell asleep. Police officer Brian Kertz was dispatched to the vehicle, which was reportedly smoking or burning under the hood, and Whitesides was arrested for DWI. *See* App. 29-30.[1]

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[1] While it was noted that Whitesides refused to leave the truck, App. 2, he explained at the administrative hearing:

At the police station Whitesides was read the implied consent warning and asked to submit to a test of his breath. App. 3-4. His responses were ambiguous. App. 4. After verbal exchanges in which Whitesides never said he would refuse to take the test, Officer Kertz declared the process over, turned off the videotape, and issued Whitesides a "Notice and Order of Revocation." App. 5. This DMV form advised Whitesides that his driver's license was revoked for refusing a breath test. App. 5. About ten seconds after Officer Kertz turned off the videotape, Whitesides offered to take the breath test; Officer Kertz testified that he could not remember whether Whitesides made this offer. App. 5.

On February 5, 1996, Whitesides timely appealed the Notice and Order of Revocation. On February 16, he wrote to the DMV requesting an in-person hearing. On February 16 and March 1, the DMV sent "Notice of Administrative Hearing" to Whitesides notifying of a hearing to be set "at the discretion of DMV." The March 1 notice provided in part:

> This is notice that the department hearing in the above matter will be held IN KETCHIKAN at THE DISCRETION OF D.M.V. (Caps in original.)

On August 21, 1996, over six months after Whitesides's arrest, the DMV gave notice of a hearing by telephone on October 2. On September 18, Whitesides

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"I jumped out of the truck [then] back into the truck to grab my screwdriver because – to open the hood. The hood release was broke."

objected to the hearing arguing the failure to grant an in-person hearing, and that:

> It took over six months for the Department of Public Safety to set the hearing, and licensee's rights have been violated, including Criminal Rule 45 and speedy trial rights.

On September 24, Whitesides filed additional objections, asserting:

> Due process of law applies to drivers license revocations. *Bell v. Burson,* 402 U.S. 535 (1971); [Alaska citations omitted]. What process is due depends on what is at stake in the governmental action in question. *Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976); [Alaska citation omitted].

In addition, Whitesides argued the failure of the Department of Public Safety to promulgate regulations governing the conduct of administrative hearings for DWI and refusal, as required by AS 28.05.141(a). He relied on *Gausman v. Department of Motor Vehicles,* 522 N.W.2d 417 (Neb. 1994) (held, failure to promulgate and file regulations governing administrative hearings for refusal violated due process; license revocation reversed). Whitesides contended that the delay was inconsistent with an expedited license revocation, the standard under state and federal law, and that the DMV's action should be dismissed.

At the telephonic hearing on October 2, 1996, Whitesides renewed his objections. The hearing officer overruled the objections, citing budget constraints and a change in the law (*see* AS 28.15.166(e)). When asked

whether he refused to give a breath sample after the officer took the videotape out, Whitesides answered:

> I didn't really refuse, I just wasn't sure what to do . . . I wanted to read the paperwork and stuff. . . . When I did say I would take the breath test, then he already made up his mind, well, you know, your time is up.

The hearing officer continued proceedings to October 24, 1996, in order to take the testimony of Officer Kertz. On October 24, she asked him whether he recalled Whitesides's offer to take the test after the videotape was removed. Officer Kertz answered that he could not recall. The hearing officer announced she would give her decision the next day. On October 25, she noted that the issue was "whether or not Mr. Whitesides changed his mind and agreed to take a breath test." That is, had he changed his mind, he would have met the legal criteria for curing a prior refusal to take a breath test.[2] The hearing officer did not believe Whitesides's account, and found that he refused to take the breath test. She revoked his driver's license for one year. App. 7. The proceedings (on October 2, 24 and 25) were all telephonic. *See* App. 7.

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[2] The factors to consider in determining whether a motorist's subsequent consent to take a breath test cures a prior refusal are: that the subsequent consent occurred within a reasonable time after the prior first refusal; that the test administered following the subsequent consent will still be accurate; that the test will not result in any substantial expense or inconvenience to the police; and that the arrestee has been in continuous custody of the arresting officer and under observation for the entire time. *Pruitt v. State, Department of Public Safety*, 825 P.2d 887, 894 (Alaska 1992).

Whitesides appealed the decision to superior court. Among other things, it rejected Whitesides's arguments concerning the lack of regulations, noting that statutory procedures "supplemented with case law, afford a driver due process." App. 32. The superior court commented that the administrative hearing was civil in nature, and delays of eight months are common in civil cases. App. 33. The superior court affirmed Whitesides's license revocation. App. 35.

Whitesides appealed to the Alaska Supreme Court. In arguing the eight-month delay, he observed:

> . . . Revocation of a driver's license has been likened to forfeiture of property, remedial and not punitive in nature. [*State v. Zerkel*, 900 P.2d 744, 752 & n. 5 (Alaska App. 1995).] The United States Supreme Court has analogized the length of time between a seizure of property and the initiation of the forfeiture hearing to the question of undue delay encompassed in the right to a speedy trial. *United States v. $8,850 in United States Currency*, 461 U.S. 555, 564, 103 S. Ct. 2005, 76 L.Ed.2d 143, 152 (1983) (noting factors to consider: the length of the delay, the reason for the delay, the claimant's assertion of his right to a hearing, and whether the claimant suffered prejudice, citing *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L.Ed.2d 201 (1972).[3]

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[3] He also argued that the eight-month delay was double the 120 days under Alaska's speedy trial rule, Alaska R. Crim.P. 45(b).

However, the court responded:

> . . . this case is different from civil forfeiture cases because Whitesides was not deprived of his right to drive pending the hearing, whereas in civil forfeiture cases, the property to be forfeited has typically been removed from the possession and use of the respondent pending the hearing.

App. 8 n. 4. With respect to Whitesides's argument on the lack of regulations, the court agreed with the superior court that AS 28.15.166 and case law afford due process. App. 8 n. 4.

While the Alaska Supreme Court rejected most of Whitesides's arguments, App. 8 & n. 4,[4] it reversed the revocation and remanded for an in-person hearing, holding that Whitesides's due process rights were violated by the denial of an in-person hearing. App. 21. In so doing, the court applied the test found in *Mathews v. Eldrige*, 424 U.S. 319 (1976). App. 10-20.

For most periods, Whitesides has enjoyed a stay of his license revocation while his appeals were pending. A new hearing has not been set.

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[4] The court did call administrative license revocation hearings quasi-criminal. App. 12.

REASONS FOR GRANTING THE WRIT

I. Alaska's statutory scheme

In Alaska, a driver's license may be administratively revoked upon an officer's report that a person has committed DWI or refusal. AS 28.15.165(c). Notice of the revocation is given to the person, AS 28.15.165(a), who must surrender his driver's license, AS 28.15.165(b). The person is notified of the right to administrative review, AS 28.15.165(a)(2), and has seven days in which to seek such review or else the revocation becomes effective and final, AS 28.15.165(a)(4) and AS 28.15.166(b). The notice is a temporary license for seven days, AS 28.15.165(a)(3), unless the person requests administrative review, AS 28.15.165(a)(4). If administrative review is requested, the temporary license is valid till the scheduled date of review. AS 28.15.166(c). The duration of administrative revocation is for the same period as court revocations in criminal DWI and refusal cases. *See* AS 28.15.165(d) (referring to AS 28.15.181(c) regarding durations of revocation by a court; the period of a court and administrative license revocation can be enhanced based on prior DWI or refusal convictions).

Administrative review is held before a hearing officer who may *inter alia* administer oaths, examine witnesses, take testimony, receive evidence, issue subpoenas, and make a final decision. AS 28.15.166(f)(1) to (6). The issues under review are whether the officer had reasonable grounds to believe that the person was driving while intoxicated, and whether a chemical test "produced a result [of .10 or more]" or the person, being advised that a refusal is a misdemeanor and results in revocation,

refused to take a breath test. AS 28.15.166(g). The burden of proof is preponderance of the evidence. AS 28.15.166(j). A person may, within 30 days of the decision, appeal to superior court, for review of whether the agency misinterpreted the law, acted in an arbitrary and capricious manner, or made a determination unsupported by the evidence of record. AS 28.15.166(m). A person may move for a stay pending appeal, having the burden to establish probability of success on the merits and irreparable harm. AS 28.15.166(n).

AS 28.05.141(a) provides in part that hearings under AS Title 28 be conducted "under regulations adopted by the commissioner governing practice and procedure and consistent with due process of law."[5] However, no regulations exist governing administrative hearings in DWI or refusal cases.

In Alaska, administrative license revocation proceedings are separate from criminal proceedings for the same conduct. *See State, Department of Public Safety v. Conley,* 754 P.2d 232, 234 (Alaska 1988). Plus, the state always bears the burden of proving that a defendant unequivocally refused to take the breath test. *Lively v. State,* 804 P.2d 66, 71 n. 2 (Alaska App. 1991). While all the states have enacted implied consent statutes making administrative license revocation the penalty for refusal, only Alaska and Nebraska have made refusal a criminal offense. *Pruitt v. State, Department of Public Safety,* 825 P.2d 887, 893 (Alaska 1992).

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[5] Hearings are informal and formal rules of evidence do not apply. *Id.* A person requesting review may have an attorney. *Id.*

II. Standards for administrative license revocation

The revocation or suspension of one's driver's license implicates an important property interest. *Mackey v. Montrym*, 443 U.S. 1, 10 (1979). The Due Process Clause applies to a state's suspension or revocation of a driver's license. *Mackey*, 443 U.S. at 10 n. 7; *Dixon v. Love*, 431 U.S. 105, 112 (1977); *Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood").

In 1996, a federal statute regarding federal highway funds to the states provided in part:

> For purposes of this section, a State is eligible for a basic grant if such State provides –
>
> > (1) for *an expedited driver's license suspension or revocation system* for individuals who operate motor vehicles while under the influence of alcohol which requires . . . [license revocation if the driver refuses a breath test]. (Emphasis added)

Former 23 USC § 410(e)(1). (In its current form, the statute requires an administrative license revocation for DWI or refusal to take effect within 30 days. 23 USC § 410(b)(1)(A)(ii).) Under this standard, the DMV fell far short of affording Whitesides an expedited hearing where eight months elapsed.

In *Padberg v. McGrath-McKechnie*, 108 F.Supp.2d 177 (E.D.N.Y. 2000), the City of New York had authority to revoke the license of taxi and limousine drivers who engaged in racially-based service refusal. While revocations were issued "on the spot," available procedures,

though confusing, allowed for a hearing within ten days of a driver's request. *Padberg*, 108 F.Supp.2d at 180.

In *Mackey*, 443 U.S. at 7, Massachusetts law allowed for an immediate hearing. In *Dixon*, 431 U.S. at 109-10, Illinois law provided for a hearing date "as early as practical" to be set within 20 days of receipt of a written request (quotations in original).

While the instant case does not involve pre-hearing revocation, it implicates due process concerns over the time for hearing. As seen *ante* at 6, Whitesides argued that *Barker v. Wingo*, 407 U.S. 514 (1972), regarding the time for a criminal trial, was applicable to his situation. In *United States v. $8,850 in United States Currency*, 461 U.S. 555 (1983), this Court had little compunction in applying *Barker* to civil forfeitures. Where Whitesides's license revocation is analogous to a forfeiture[6] and is quasi-criminal, the *Barker* factors should readily apply.

The first factor is the length of the delay. Here, the eight-month delay was inordinately long. Although eight months is not long in other contexts, where administrative license revocation is expedited in nature, this factor should militate heavily against the State of Alaska. Noting that a driver has a scant seven days in which to request review (or else the revocation is final), a delay of eight months is greatly out of proportion with the policy to remove dangerous drivers from the road quickly.

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[6] *See State v. Zerkel*, 900 P.2d 744, 752 n. 5 (Alaska App. 1995) (scrutinizing whether license revocation is analogous to forfeiture and observing that, if so, the analogy would be to forfeiture of contraband).

The second factor is reason for the delay. While citing budget constraints, the DMV scheduled a telephonic hearing when a convenient change in the law provided for it. App. 6 & n. 3; *see* AS 28.15.166(e). Beforehand, in-person hearings were the norm. App. 18. Whitesides had nothing to do with the delay. This factor bodes unfavorably for the State of Alaska.

The third factor is one's assertion of his right to a hearing. Whitesides timely requested a hearing. Eleven days later, he requested an in-person hearing. Meanwhile, the DMV gave notice of a hearing in Ketchikan at its discretion. Where Whitesides modestly asserted his right to a hearing, the factor cannot be said to go against him.

The fourth factor, whether Whitesides suffered prejudice, militates in his favor. By the time of the hearing, Officer Kertz had forgotten whether Whitesides offered to take the test after the videotape was shut off. While the Alaska Supreme Court discounted this argument, App. 8 n. 4 (noting that Officer Kertz had forgotten by the time of the criminal trial in June 1996), it ignored the expedited nature of license revocation proceedings which, by definition (and as a matter of public policy), should be shorter than the time for a speedy trial. Whitesides's testimony alone was insufficient, and the only other person who could corroborate his account had forgotten. Because Whitesides suffered real prejudice, this factor inures to his favor.

Considered together, the totality of the factors leads to the conclusion that Whitesides was deprived of the

due process right to a fair hearing within a meaningful time.[7]

III. The State of Alaska's failure to promulgate regulations

Despite the clear mandate of AS 28.05.141(a), the state agency has failed to promulgate regulations governing the conduct of administrative license revocation proceedings. Yet the Alaska Supreme Court rejected the argument. In this respect, Alaska differs from Nebraska in its treatment of the issue. *See Gausman v. Department of Motor Vehicles*, 522 N.W.2d 417 (Neb. 1994) (discussed *ante* at 4).

Drafting proposed regulations, with its attendant notice and opportunity for public comment, is an important administrative function. While the procedures found in AS 28.15.165 and AS 28.15.166 are extensive, they do not specify a time for hearing, which would be cured by adopting regulations.

This Court has held that, generally, an agency must follow its own rules. *See Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). The Alaska DMV follows the rules in AS 28.15.165 and AS

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[7] Curiously, the dissent in the 5-4 decision, *United States v. Loud Hawk*, 474 U.S. 302, 323-26 (1986) (Marshall, J., dissenting), in assessing the *Barker* factors, would consider undue delay caused by appellate proceedings. While Whitesides asserts that the violation occurred at the administrative level, he now faces a hearing over five years after the fact.

28.15.166, but has chosen not to follow the dictate in AS 28.05.141(a) to adopt regulations. This is improper.

In addition, this Court has had occasion to pass upon the infirmities in state law, though upheld by the state's high court. *See e.g. Bush v. Gore*, 531 U.S. ___ (2000) (reversing the Florida Supreme Court, on equal protection grounds, in its interpretation of state voting and recounting laws).

The DMV, contrary to a statute dealing with its basic composition in adjudicative proceedings, has not promulgated regulations governing its proceedings. This Court should resolve the differences in Alaska and Nebraska law, and hold that this failure violates due process.[8]

CONCLUSION

The instant case is worthy of a grant of certiorari. While the question of an undue delay may be close, Whitesides's situation is compelling, and is likely to recur. The criminal charges were dismissed, and his account of offering to take a breath test was uncontradicted. The delay of eight months is incommensurate with standards for administrative license revocation.

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[8] The State of Alaska may argue that this Court is without jurisdiction where Whitesides's case was remanded to the DMV which has yet to issue a final decision. However, where the federal issue is conclusive, this Court has found jurisdiction. *See Florida v. Thomas*, 532 U.S. ___, ___ (2001).

Plus, the DMV without cause has failed to promulgate regulations. Whitesides respectfully submits that for these reasons, the petition for writ of certiorari should be granted.

Dated: July 10, 2001

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*Notice: This opinion is subject to correction before publication in the **Pacific Reporter**. Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878.*

THE SUPREME COURT OF THE STATE OF ALASKA

FRANK A. WHITESIDES, Appellant, v. STATE OF ALASKA, DEPARTMENT OF PUBLIC SAFETY, DIVISION OF MOTOR VEHICLES, Appellee.	Supreme Court No. S-8431 Superior Court No. 1KE-96-504 CI O P I N I O N [No. 5388 – April 13, 2001]

Appeal from the Superior Court of the State of Alaska, First Judicial District, Ketchikan, Michael A. Thompson, Judge

Appearances: Michael J. Zelensky, Ketchikan, for Appellant. Marilyn J. Kamm, Assistant Attorney General, Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before: Matthews, Chief Justice, Eastaugh, Fabe, Bryner, and Carpeneti, Justices.

MATTHEWS, Chief Justice.
EASTAUGH, Justice, concurring.
CARPENETI, Justice, dissenting

The question presented is whether licensed drivers are entitled to in-person hearings before a hearing officer concerning the revocation of their licenses, or whether telephone hearings satisfy due process. We hold that where drivers' credibility is material in-person hearings are required. The right to drive is important, in-person communications are more effective in transmitting a sense of whether a party is telling the truth, and added costs do not outweigh the value of in-person hearings.

Facts

At approximately 11:00 p.m. on January 28, 1996, Ketchikan Police Officer Brian Kertz was alerted to a possible car fire in downtown Ketchikan. Upon investigation, Kertz saw a "large amount of smoke billowing from the engine" of the pickup truck in which Frank Whitesides and his friend were sitting. Whitesides was sitting in the driver's seat, and the keys were in the ignition. Whitesides and his friend ignored Kertz's command to exit the vehicle. Kertz used his fire extinguisher to put out flames coming from beneath the vehicle and pulled the two out of the truck.

According to Kertz, Whitesides exuded a "very strong odor of intoxicants" and his eyes were "bloodshot, and watery." Based on his observations, Kertz administered field sobriety tests to Whitesides; based on

Whitesides's performance during these tests, Kertz placed him under arrest for driving while intoxicated (DWI).[1]

Kertz took Whitesides to the police station, where he began "processing" Whitesides for DWI. Kertz read Whitesides the "implied consent warning," in which Kertz informed Whitesides that he was being asked to submit to a chemical test of his breath. Kertz explained the operation of the Intoximeter 3000 (the apparatus that would measure the amount of alcohol in Whitesides's breath) as well as the possible consequences of refusing to take the breath test. He also offered Whitesides access to a telephone and telephone directory so that he could call an attorney.

Eventually, Kertz prepared the Intoximeter to receive a sample of breath and asked Whitesides, "Did you want

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[1] AS 28.35.030(a) defines operating a vehicle while intoxicated as follows:

> A person commits the crime of driving while intoxicated if the person operates or drives a motor vehicle or operates an aircraft or a watercraft
>
> (1) while under the influence of intoxicating liquor, or any controlled substance;
>
> (2) when, as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.10 percent or more by weight of alcohol in the person's blood or 100 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.10 grams or more of alcohol per 210 liters of the person's breath; or
>
> (3) while the person is under the combined influence of intoxicating liquor and a controlled substance.

to submit a sample of breath?" Whitesides responded by protesting that he "wasn't driving anywhere." At that point, Kertz repeated his recitation of the potential consequences for refusing to submit to a chemical test. Kertz asked Whitesides to submit to the test several more times; Whitesides's responses to these requests were ambiguous and poorly focused. For example, on one occasion, Whitesides agreed to take the test but then protested that he had not been driving. On another occasion, Whitesides asked to review information that Kertz had already read to him.

Kertz eventually concluded that Whitesides had refused to take the test and notified him that, if he changed his mind before Kertz finished with the rest of the process, he would be allowed to submit a sample.

Disregarding Whitesides's protestations that he had not refused to take the test, Kertz asked Whitesides whether he wanted to sign a form saying that he refused. Whitesides asked if he needed a lawyer to read the form before he signed it. After some discussion with Kertz, Whitesides decided not to call an attorney.

Kertz then allowed Whitesides to read a document detailing the refusal offense and its attendant consequences while Kertz prepared the Intoximeter for a second time. Kertz then told Whitesides that "[i]f you refuse this time, this is the second time that I've run the machine, you are going to be charged." Whitesides responded by asking Kertz to "[w]ait a minute," and repeated that he wasn't driving. Kertz then told Whitesides that "[t]his is your last opportunity. You've got to give me yes or no. Do you want to submit a sample of

breath on the Intoximeter?" Whitesides, however, did not reply with a "yes" or "no"; rather, he asked Kertz whether he would be arrested for DWI if he submitted to the test.

Kertz then read Whitesides a "notice and order of revocation" for his refusal to submit to the breath test. Following Whitesides's question as to the consequences of taking and passing the test,[2] his comment about the difficulty of the situation he faced, his refusal to sign a form indicating his refusal to take the test, and various other comments by Whitesides, Kertz asked one last time, "Do you want to submit a sample of breath in the Intoximeter 3000?" When Whitesides gave an indiscernible answer, the officer declared the process over and turned off the video recorder. Kertz then issued Whitesides a "notice and order of revocation" advising him that his driver's license would be revoked for refusing to submit to testing.

At the administrative hearing several months later, Whitesides testified that he had agreed to take the test about "ten seconds" after Kertz turned off the video recorder. Kertz testified that he could not remember whether Whitesides had made this offer. Kertz was also asked if he would have permitted Whitesides to take the test if Whitesides had agreed to take it just after Kertz turned off the video recorder. He indicated uncertainty

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[2] The Ketchikan Police Department's unofficial transcript contains an erroneous version of this exchange. We have characterized Whitesides's comment based on our review of the tape.

because "I guess I've never had it actually happen that I can remember before, in my career."

Proceedings

Whitesides sought administrative review of the "notice and order of revocation" of his driver's license on grounds that included his claim that he did not refuse to take a breath test. Whitesides requested that the hearing be conducted in person. On March 1, 1996, the Department of Public Safety gave Whitesides notice of an administrative hearing scheduled "at the discretion of D.M.V."

Whitesides was also charged with the criminal offenses of DWI and Refusal. A criminal trial commenced but ended in a mistrial. The criminal charges were later dismissed by the district attorney's office.

The Division of Motor Vehicles (DMV) never scheduled an in-person hearing. Meanwhile, effective July 4, 1996, the legislature amended AS 28.15.166(e) to require that revocation hearings "be held by telephone unless the hearing officer finds that a telephonic hearing would substantially prejudice the rights of the person involved in the hearing or that an in-person hearing is necessary to decide the issues to be presented in the hearing."[3] Consequently, the Department of Public Safety scheduled a

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[3] *See* 1st Sp. Sess. Ch. 6, § 8 SLA 1996. Former AS 28.15.166(e) provided for an in-person hearing held "at the office of the department nearest to the residence of the person requesting the hearing." Current law provides for the same locations for in-person hearings when they are found to be required.

telephone hearing for October 2, 1996. Whitesides objected to the telephone hearing, arguing that "[t]he failure to allow a hearing in-person would substantially prejudice [his] rights . . . in that he is a witness . . . along with, if necessary, the arresting officer and potentially another witness. . . . " Whitesides also objected to the extensive delay in scheduling his hearing.

The hearing officer overruled Whitesides's objections, and the DMV proceeded with its revocation action against Whitesides's license. The hearing officer heard Whitesides's challenge to the revocation in a series of three telephone hearings involving Whitesides, his attorney, and the hearing officer, beginning on October 2, 1996 – some eight months after the arrest. After hearing argument from Whitesides's attorney and testimony from Whitesides, Kertz, and the district attorney who dismissed the criminal charges, the hearing officer found that Whitesides refused to submit to a breath test. Whitesides's license was ordered revoked for a period of one year from the date of the hearing officer's decision.

Whitesides appealed this decision to the superior court, which upheld the hearing officer's determination. On appeal to this court, Whitesides argues (1) that the DMV violated his right to due process by denying an in-person hearing; (2) that the DMV's delay in holding the license revocation hearing violated Whitesides's right to due process; (3) that the "lack of regulations" governing administrative license revocation hearings violated Whitesides's due process rights; (4) that the hearing officer's findings that Whitesides refused the breath test were unsupported by the evidence; and (5) that the hearing officer erred in finding that there were reasonable

grounds to believe that Whitesides was guilty of DWI when he was arrested.

We decide that only the first issue has merit and summarily determine the other issues adversely to Whitesides.[4]

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[4] Concerning his delay claim, Whitesides likens this case to *United States v. $8,850 in United States Currency*, 461 U.S. 555 (1983), in which the United States Supreme Court held that delay in initiating a civil forfeiture case may violate due process and suggested a test similar to that used to determine whether an accused's right to a speedy trial in a criminal case is violated. *Id.* at 564. But this case is different from civil forfeiture cases because Whitesides was not deprived of his right to drive pending the hearing whereas in civil forfeiture cases the property to be forfeited has typically been removed from the possession and use of the respondent pending the hearing. *Id.* Further, although Whitesides claims that the eight-month delay resulted in Officer Kertz's lack of memory concerning what was said after the video recorder was shut off, this claim is not supported by the record. At Whitesides's criminal trial in June 1996, within speedy trial limits, Kertz was already unable either to verify or to directly contradict Whitesides's account of events after the video camera was turned off.

Whitesides's lack of regulations argument is fully addressed by the decision of the superior court. Procedures for carrying out administrative review of license revocations are set forth in AS 28.15.166. These procedures, as supplemented by pertinent case law, afford a licensee due process. Whitesides claims that the hearing officer's determination that he had refused to take the breath test is unsupported by substantial evidence; such a claim juxtaposes his refusals while the video camera was running with the alleged cure of these refusals just after the video camera was turned off. The video tape itself is substantial evidence that Whitesides refused to take the test. Likewise, the video tape supports an inference that it is unlikely that Whitesides cured his prior refusals, given the behavior shown by the tape. As the hearing officer stated:

The DMV's Denial of an In-person Hearing Constituted a Due Process Violation.

Arguing that credibility was crucial to the central issue in this case, whether he agreed to take the breath test, Whitesides contends that his license revocation should be "reversed for failure to grant an in-person hearing." Without a chance to observe Whitesides's demeanor, he states, the hearing officer could not "fairly and meaningfully" assess his credibility. He contends that since his credibility was at issue in the hearing, the due process clause of the Alaska Constitution[5] affords him the right to present his testimony in person to the trier of

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> Mr. Whitesides is asking me to take a leap of faith. I have to believe that two people transformed their demeanor as soon as the videotape was turned off. In that instance, Mr. Whitesides changes his negative attitude to a positive one and Officer Kertz changed from trying to get a breath sample to trying to prevent one. I don't believe this happened.

Further, Kertz's statement that he did not remember anyone ever recanting also supports the conclusion that a recantation did not take place in Whitesides's case.

As to the argument that there were not reasonable grounds to believe that Whitesides had been guilty of DWI, Whitesides argues that the vehicle in which he was sitting was inoperable because it had caught fire while he was sitting in it. But the evidence is uncontradicted that the vehicle was operable when Whitesides turned it on, and Officer Kertz's observations of Whitesides's condition reasonably suggested that Whitesides was intoxicated.

[5] Article I, section 7, of the Alaska Constitution provides, in part, that "[n]o person shall be deprived of life, liberty, or property, without due process of law."

fact. The standard of review applicable to this issue is de novo.[6]

We apply the framework of *Mathews v. Eldridge*[7] when evaluating whether administrative proceedings satisfy due process.[8] We consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[9]

We proceed to review these considerations in the context of this case.

1. A driver's license is an important property interest.

Whitesides's interest is in retaining his right to drive. Both federal and state courts have recognized that a driver's license is an important property interest. In *Bell v. Burson*, the United States Supreme Court explained

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[6] *See Barcott v. State, Dep't of Pub. Safety*, 741 P.2d 226, 228 (Alaska 1987) (court will adopt the rule most persuasive in light of precedent, reason, and policy).

[7] 424 U.S. 319 (1976).

[8] *See Noden v. Commercial Fisheries Entry Comm'n*, 680 P.2d 493, 499 (Alaska 1984).

[9] *Mathews*, 424 U.S. at 335.

that, "[o]nce licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood."[10] Issued licenses are "important interests of the licensees, . . . [which] are not to be taken away without that procedural due process required by the Fourteenth Amendment."[11]

In *Berlinghieri v. Director of Motor Vehicles*, the California Supreme Court explained at length the practical importance of a driver's license:

> In our present travel-oriented society, the retention of a driver's license is an important right to every person who has obtained such a license. . . . [T]he reality of contemporary society is that public transportation systems may not meet the needs of many travellers [sic] and other forms of transportation, such as taxicabs, are not economically feasible for a large portion of the population.
>
> Whether a driver's license is required only for delivering bread, commuting to work, transporting children or the elderly, meeting medical appointments, attending social or political functions, or any combination of these or other purposes, the revocation or suspension of that license, even for a six-month period, can and often does constitute a severe personal and economic hardship.
>
> For plaintiff, as a route driver, her ability to drive a delivery truck affects her very livelihood and the suspension of her license obviously will

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[10] 402 U.S. 535, 539 (1971).

[11] *Id.*

> affect her directly, immediately, and adversely. Further, as a single working parent, she is faced with the numerous responsibilities of child rearing, many of which necessitate a speedy and reliable means of transportation. The suspension of plaintiff's license, even for only six months, may have profound and obvious effects on her "life situation" and thus, . . . constitutes "quasi-judicial" administrative decisions that have an impact on the individual "sufficiently vital . . . to compel full and independent review" by the court.[12]

This court has likewise recognized that "[a] driver's license is an important property interest."[13] Calling driver's license revocation hearings quasi-criminal, we have held that the right to test the reliability of a breath test applies in civil driver's license revocation proceedings as well as in criminal prosecutions for DWI.[14] And we have applied a prophylactic rule to exclude from a license revocation proceeding the results of a Breathalyzer test secured in violation of the defendant's right to

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[12] 657 P.2d 383, 387-88 (Cal. 1983) (citations omitted); *see also Shavers v. Kelley*, 267 N.W.2d 72, 87 (Mich. 1978), *cert. denied*, 442 U.S. 934 (1979) ("In Michigan the independent mobility provided by an automobile is a crucial, practical necessity; it is undeniable that whether or not a person can obtain a driver's license or register and operate his motor vehicle profoundly affects important aspects of his day-to-day life.").

[13] *Champion v. Department of Pub. Safety*, 721 P.2d 131, 133 (Alaska 1986).

[14] *See id.* at 132-33.

counsel.[15] These cases underscore the importance of the right to drive.

2. In-person testimony is a valuable tool for evaluating the credibility of witnesses.

Here we deal with the second of the *Mathews* factors. In terms applicable to this case, do telephone hearings create an unacceptable risk of an erroneous deprivation of a person's right to drive? This turns in large part on the value of the live testimony of a party.

The significance of live testimony and demeanor evidence has been long recognized. Blackstone explained that, "[by] examination of witnesses *viva voce*, in the presence of all mankind, . . . and this [method] only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness."[16] This method "was also indeed familiar among the *antient* Romans . . . [a]nd this, or somewhat like it, was continued as low as the time of Hadrian."[17]

Courts have emphasized the advantages inherent in a traditional hearing in which witnesses testify in the presence of the trier of fact. For example, in *Mattox v. United*

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[15] *See Whisenhunt v. State, Dep't of Pub. Safety*, 746 P.2d 1298, 1299 (Alaska 1987).

[16] 3 William Blackstone, *Commentaries* *373.

[17] *Id.* *374.

States, the United States Supreme Court noted that personal examination and cross-examination of the witness provides the accused with

> an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[18]

In this state, we have also recognized the uniqueness of the trial court's position to judge credibility. In *Alaska Foods, Inc. v. American Manufacturer's Mutual Insurance Co.*, we held that

> when there has been oral testimony, and the trial judge has observed the witnesses in person, we must pay some deference to his judgment as to credibility to the extent that his findings are based on such oral testimony . . . because . . . we cannot have the advantage that the trial judge has had of basing a judgment as to credibility on the demeanor of the witnesses that appear before him.[19]

Other states have long traditions acknowledging the special abilities of the fact finder. In *Durant v. Rogers*, the Illinois Supreme Court held:

> "It is a rule, that the jury shall be the sole judges of the credibility of a witness. They see them on the stand, mark their demeanor, perceive many small matters which escape less observant eyes,

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18 156 U.S. 237, 242-43 (1895).

19 482 P.2d 842, 845 (Alaska 1971).

> and are in the best position to judge of credibility, and they have an undoubted right to find in favor of the testimony of one when weighed against that of the other."[20]

The unique ability of the hearing officer or trial court to evaluate credibility has, for example, a strong influence on the standard of review. According to *Evans v. Evans*, this court reviews findings of fact for substantial evidence because the trier of fact is "in the best position to evaluate the witnesses' credibility and their testimony."[21] Deference to those who actually observe witnesses is codified at Alaska Civil Rule 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." This court consistently grants deference to trial courts where credibility is at issue, as for example in *Kohl v. Legoullon*, where we noted that "[t]he trial court is in the best position to assess the credibility of witnesses."[22] Similarly, in *Crook v. Mortenson-Neal*, we recognized that "the superior court was in the best position to evaluate the defendants' demeanor and credibility. We, therefore, defer to the court's view as expressed in the quoted finding."[23]

This case law indicates that in-court testimony has persuasive characteristics absent from testimony given

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[20] 87 Ill. 508, *3 (Ill. 1877).

[21] 869 P.2d 478, 481 (Alaska 1994).

[22] 936 P.2d 514, 518 n.5 (Alaska 1997)

[23] 727 P.2d 297, 306 (Alaska 1986).

out of the presence of the trier of fact.[24] Where the witness's truthfulness is disputed, demeanor can be important.[25] In such cases, denying an in-person hearing denies a party an opportunity to present evidence in the most effective way possible.

We do not wish to overstate the benefits of communicating in person, nor the drawbacks of telephone communication. We live in an era when efficiency often dictates that many communications be machine-facilitated. When the technology employed is operating well, such communications are at least good enough to transmit basic information. But the potential for empathy and nuanced understanding is much greater in person-to-person communications than in any of the various forms of telecommunicating. Likewise, when a party is denied an in-person hearing before a trier of fact, there is a risk that the party will be less able to convey the message that his story is the truth.

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[24] *See, e.g., Monsma v. Williams*, 385 P.2d 107, 111 (Alaska 1963) ("In a case, heavy with demeanor evidence as this was, it was the task of the trial court, not ours, to resolve the apparent conflict between the evidence of the plaintiff and that of the defendant."); *Awes v. Walker*, 370 P.2d 187, 190 (Alaska 1962) ("In reviewing the findings of the trial court, we do not have before us evidence of Walker's demeanor while testifying.").

[25] *Cf. McBride v. State*, 368 P.2d 925, 926 (Alaska 1962), *cert. denied*, 374 U.S. 811 (1963), *modified by Barber v. Page*, 390 U.S. 719 (1968) (" 'demeanor evidence' is acknowledged to be highly desirable and an advantage to be insisted upon whenever it can be had and where an accused considers it important" (footnote omitted)).

We recognize that legal authority supports the use of telephone hearings and testimony in many circumstances. For example, Alaska Civil Rule 99 allows one or more parties, counsel, witnesses, or even the judge "to participate telephonically in any hearing or deposition for good cause and in the absence of substantial prejudice to opposing parties."[26] In *Matter Involving Triem*, we rejected the contention that a committee chairperson's telephone participation in a bar disciplinary hearing violated the defendant's due process rights, adding that "[t]he routine nature of such appearances belies [the litigant's] due process concerns."[27] Most recently, in *Silvers v. Silvers*, we found an abuse of discretion where the trial court refused to allow the defendant to testify by telephone in a civil trial.[28]

These authorities show that the convenience afforded by telephone participation is not generally outweighed by the values associated with in-person participation. But, except for *Triem*, which is distinguishable on other grounds,[29] they do not hold that a party who desires to

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[26] Alaska R. Civ. P. 99. Notably, there is no provision whereby a juror may participate telephonically.

[27] 929 P.2d 634, 642 (Alaska 1996), *cert. denied*, 520 U.S. 1198 (1997).

[28] 999 P.2d 786, 790 (Alaska 2000).

[29] *Triem* is distinguishable because the objection there concerned the inability of one committee member participating by telephone in a second hearing to assess the demeanor of witnesses, not the party. The party had testified in person before the whole committee at an earlier hearing. Further, only one committee member participated by telephone. The other members heard the witnesses in person.

present testimony in person to the trier of fact does not have that right.

3. The government's interest in cost saving and public safety will not be greatly prejudiced by granting in-person hearings where credibility is at issue.

The *Mathews v. Eldridge* construct next requires that we consider the nature of the government's interest, how it is affected by the challenged procedure, and how it might be affected if the procedure were changed.[30] We turn to these questions.

The foremost government interest involved in driver's license revocation proceedings is public safety. Intoxicated drivers kill and injure others. One can reasonably conclude that revoking the licenses of those who refuse to take breath tests is an important part of the state's program to reduce instances of driving while intoxicated. The state also has an interest in providing hearings at a reasonable cost.[31]

Public safety will not be prejudiced by providing a person who is under threat of license revocation with an in-person hearing. Such hearings were the norm until the 1996 passage of AS 28.15.166(e). There is no suggestion in the legislative history of the 1996 act that its purpose was to increase the revocation rate of those accused of refusing breath tests. Indeed, if the revocation rate were increased by prohibiting in-person hearings, this would

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[30] 424 U.S. 319, 335 (1976).

[31] *See Mathews v. Eldridge*, 424 U.S. at 348.

tend to prove that this reform increased the risk of the erroneous deprivation of driving rights.

Cost saving is at the root of the presumptive prohibition of in-person hearings. The length of a hearing conducted by telephone should not be significantly different than a hearing conducted in person. But if hearing officers are to travel to the DMV offices closest to where respondents reside, then travel costs and travel time for hearing officers will be greater for in-person hearings than for telephone hearings.

But greater costs are only incurred in cases in which the hearing officer must travel. In most cases no travel is necessary. Most revocations arise in Anchorage. DMV has a large number of employees in Anchorage and could require some hearing officers to maintain offices there. Similarly, in cases arising in Juneau there is no justification for refusing an in-person hearing, since DMV hearing officers have offices there.

As to other locations without resident hearing officers, economies could be effected in other ways. Ad hoc hearing officers can be appointed. Or magistrates might be authorized to serve.[32] Alternatively, hearing officers can limit their travel to times when they have several cases for hearing. Further, respondents requesting an in-person hearing might be required to travel to a location

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[32] *See* AS 22.15.100(10) (granting district judges and magistrates authority "to review administrative revocation of a person's driver's license or nonresident privilege to drive . . . when designated as a hearing officer by the commissioner of administration and with the consent of the administrative director of the court system.").

served by a resident hearing officer, or to pay a share of the cost of the hearing officer's travel.

We do not minimize the legitimacy of cost savings as an objective of government. But given the circumstances and alternatives discussed above, we do not think that providing in-person hearings to parties who want them, in cases where their credibility is at issue, must be significantly more costly than the present system.

Considering then the importance of the driving privilege, the greater potential for effective communication in an in-person context, the need for effective communication where the credibility of a party is at issue, and the limited nature of the prejudice that the state would suffer by providing in-person hearings in such cases, we conclude that such hearings should be provided where requested by the party.

Subsection .166(e) Should Be Construed So as to Avoid Unconstitutionality.

Alaska Statute 28.15.166(e) requires telephone hearings "unless the hearing officer finds that a telephonic hearing would substantially prejudice the rights of the person involved in the hearing or that an in-person hearing is necessary to decide the issues to be presented in the hearing." This does not specify the circumstances under which a telephone hearing may substantially prejudice a defendant's rights or when an in-person hearing is necessary to decide the issues presented. "Where it is reasonable to do so, we will construe a statute to avoid

constitutional problems."[33] In keeping with our conclusion that in-person hearings are required by due process in cases where the credibility of a party is in question, we construe subsection .166(e) to require in-person hearings where a party requests such a hearing and material questions depend on the credibility of the party's testimony.

In the present case, Whitesides made a timely request for an in-person hearing and objected when a telephone hearing was scheduled instead. This case involves material issues of his credibility. Therefore, an in-person hearing should have been held.

Conclusion

The decision of the superior court is REVERSED and this case is REMANDED to the superior court with instructions to VACATE the revocation of Whitesides's driver's license and to REMAND the case to the Division of Motor Vehicles for an in-person license revocation hearing.

EASTAUGH, Justice, concurring.

The result the court reaches here is correct, but I disagree with the court's analysis. In my view, Justice Carpeneti's dissent correctly reasons that a case-specific inquiry is required when deciding whether due process demands that a hearing in a driver's license revocation case be held in person. In comparison, the court's opinion

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[33] *See Chenega Corp. v. Exxon Corp.*, 991 P.2d 769, 785 (Alaska 1999).

may assume that every driver's license revocation inherently raises credibility issues and that it is not necessary to make a particularized request for an in-person hearing by identifying logically valid reasons why the hearing must be held live.

Even though I agree with Justice Carpeneti that the inquiry must be case-specific, I agree with the result reached by the court.

It is a close question whether Whitesides informed the hearing officer of circumstances that made it an abuse of discretion to deny his request. But on balance, Whitesides did enough. In his request for administrative hearing, Whitesides, through counsel, asserted that "I did not refuse to take a breath test." In his objection to an administrative hearing, he stated, again through counsel, that "the failure to allow a hearing in-person would substantially prejudice the rights of licensee, in that he is a witness along with, if necessary, the arresting officer. . . . " These assertions might have been more specific, but together they should have led the hearing officer to realize that Whitesides was denying that he had refused to be tested, and that he and the arresting officer would disagree about whether he had refused. This disagreement inherently raised a credibility issue that was critical to the limited issues relevant to his revocation proceeding. It was therefore an abuse of discretion to deny Whitesides an opportunity to present live testimony to the hearing officer.

I therefore concur in the result the court reaches although I respectfully disagree with its analysis.

CARPENETI, Justice, dissenting.

I dissent from today's ruling for two reasons. First, I disagree with the court's implied finding that Whitesides adequately raised before the hearing officer his claim that due process required an in-person hearing because credibility was a central issue. In fact, nowhere in the entire administrative record of this case is the word "credibility" found. What Whitesides did, in shotgun fashion, was raise several non-specific claims, to one of which this court has now, after the fact, attached a particular meaning that the record does not support. Second, and more important, the statute in question, properly applied by hearing officers of the Department of Public Safety whose decisions are reviewable by this court, protects the due process rights of drivers who face license revocation for refusal to submit to tests.

Whitesides did not request an in-person hearing on grounds that credibility would be at issue.

Whitesides first requested an in-person hearing in Ketchikan because of the number of witnesses involved: "[M]y client requests that his administrative hearing of his license revocation be held in person in Ketchikan. In other words, this hearing should be conducted by the Hearing Officer in Ketchikan. *This is due to the number of witnesses to be called.*" (Emphasis added.) Later, after the department scheduled a telephonic hearing, he filed an "Objection To Administrative Hearing (and Request for Telephonic [sic] Hearing)" in which he objected to the DMV's notice of telephonic hearing. He stated:

> The failure to allow a hearing in-person would substantially prejudice the rights of licensee, in

> that he is a witness along along [sic] with, if necessary, the arresting officer and potentially another witness (in rebuttal, Trevor Stephens, Asst. DA). *Because of the number of diverse witnesses*, any hearing should be in Ketchikan, not by telephone, and licensee requests the hearing in Ketchikan.

(Emphasis added.) In short, Whitesides's argument was that the number of witnesses required the hearing in Ketchikan, not that credibility was his concern. Finally, shortly before the hearing Whitesides filed "Additional Objections to Hearing." While he argued several ways[1] in which his due process rights would be violated by the upcoming hearing, he made no mention of the fact that it was to be telephonic or that credibility was an issue. In these circumstances, I cannot join the court's implied finding that Whitesides adequately raised credibility as the reason for requesting an in-person hearing.

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[1] Whitesides argued that it was a violation of due process for DMV to act without regulations adopted by the commissioner; that "[r]evocation of a driver's license requires the full panoply of due process protections, including a jury trial"; that his conduct was "indisputably safe conduct: safely parked and braked, and safely warding off hypothermia"; and that federal law makes clear that any revocation can be only temporary and that the delay in his case of more than six months was more than temporary.

Alaska Statute 28.15.166(e) protects the due process rights of drivers faced with administrative revocation of their licenses for failure to submit to tests.

The statute gives the hearing officer the power to require an in-person hearing if it is necessary to protect the rights of the driver or for other reasons:

> The hearing under this section must be held by telephone unless the hearing officer finds that a telephonic hearing would substantially prejudice the rights of the person involved in the hearing or that an in-person hearing is necessary to decide the issues to be presented in the hearing.[2]

It seems clear that the legislature was concerned precisely about the issues addressed in today's opinion and set out the procedure by which those issues should be addressed. And in this case, the hearing officer considered the non-specific request for an in-person hearing, properly determined that it did not set out sufficient grounds, notified counsel for Whitesides of its deficiency, and specifically invited supplementation of the request for an in-person hearing:

> This letter is in reference to y[o]ur motion for an in person hearing for your client Frank Whitesides. The rescheduling of the hearing does not change the issues for review under AS 28.15.166(g). The statutes governing the issues rema[i]n the same and were in place at the time of your client's arrest. Your motion is denied.

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[2] AS 28.15.166(e).

> We do not believe that rescheduling a hearing to a telephonic hearing denies any participant their rights under due process. *Your motion did not establish any circumstances that would substantially prejudice the rights of the parties involved or that an in person hearing is necessary to decide the issues.*
>
> *If there are circumstances that we have not been advised of, you should present them at the hearing.* Please contact this office if you have any questions.

(Emphasis added.) Whitesides failed to respond to the letter or to advise the hearing officer at the hearing of those "circumstances that [the hearing officer had] not been advised of" that would lead her to reverse her decision not to provide an in-person hearing.

The statute establishes the proper standard to protect the right of the driver to an in-person hearing.[3] Such a hearing will be afforded if a telephonic hearing substantially prejudices any party or if an in-person hearing is necessary to decide any issues.[4] In this case the hearing officer properly determined that "the number of witnesses" was not a sufficient reason to require an in-person hearing, that is, did not substantially prejudice the rights of the parties nor establish that an in-person hearing was necessary to decide the issues. But she went further and noted the standard for Whitesides and invited further information or argument on the issue. Under these circumstances, there is no reason to construe

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[3] *See id.*

[4] *See id.*

the statute further and no reason to provide relief to a litigant who neither raised the credibility issue originally nor when requested by the hearing officer to provide any further reason for the relief he sought.

Our jurisprudence makes clear the case-specific nature of the application of discretionary rules regarding telephonic versus in-person proceedings.[5] We ourselves have adopted a rule for telephonic proceedings that adopts the standard – absence of substantial prejudice – utilized by the legislature in AS 28.15.166(e):

> The court may allow one or more parties, counsel, witnesses or the judge to participate telephonically in any hearing or deposition for good cause and in the absence of substantial prejudice to opposing parties.[6]

Especially in rural areas of the state, trial courts not uncommonly allow telephonic proceedings where the judge is in one location, a witness in another, and the attorneys in another.

The court should review the department's action in light of the specific facts of each case under the standard that we have always utilized, abuse of discretion.[7] Because I believe that in this case the hearing officer did

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[5] *Compare Gregg v. Gregg*, 776 P.2d 1041, 1044 (Alaska 1989) (trial court did not abuse discretion in allowing telephonic testimony of material witness over objection) *with Silvers v. Silvers*, 999 P.2d 786, 790 (Alaska 2000) (trial court abused discretion in precluding party from testifying telephonically).

[6] Alaska R. Civ. Proc. 99.

[7] *See Silvers*, 999 P.2d at 790; *Carvalho v. Carvalho*, 838 P.2d 259, 262 (Alaska 1992).

not abuse her discretion in declining to order an in-person hearing where the reason advanced was "the number of witnesses," and where no mention was made of assessing the credibility of the witnesses, I would find no abuse of discretion and affirm the superior court's affirmance of the hearing officer's action.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

FRANK A. WHITESIDES, Appellant, vs. STATE OF ALASKA, DEPARTMENT OF PUBLIC SAFETY Appellee.	Case No. 1KE-96-504 CI FILED in Trial Courts State of Alaska, First District at Ketchikan Clerk of the Trial Courts (Filed Oct. 02, 1997)

I. Facts

On January 28, 1996, Appellant, Frank Whitesides and a friend drove from their residence to a bar in Ketchikan to watch the superbowl and have a few drinks. Following the game, Whitesides and his friend had plans to stay downtown at another friend's apartment. Whitesides had a key to the apartment door, but did not have the key card to get into the building. Whitesides and his friend decided to wait in his truck until eleven o'clock, at which time they could get the key card from a friend who was working at a local hotel. To fight off the cold, Whitesides started the truck to run the heater. Whitesides and his friend fell asleep.

A Ketchikan Police Officer was dispatched to Whitesides' vehicle which was reportedly smoking or on fire. The officer, upon discovering that Whitesides had been drinking arrested him for driving while intoxicated. At the police station, the officer requested Whitesides to take

a breath test while being videotaped. Whitesides did not take the test.

The criminal charges against Whitesides were later dropped, but the Department [sic] of Motor Vehicles ("DMV") had revoked his license for refusing to take the breath test. Whitesides made a timely request for an in-person administrative review of this license revocation. Whitesides received notice that the hearing would be held in Ketchikan at a date to be set by DMV. However, on August 21 he received notice that DMV would hear this telephonically on October 2.

On September 18, Whitesides sent a letter to DMV to express his discontent about the tardiness of the hearing and the denial of his request for an in-person hearing. A few weeks later, he sent another letter this time to object to the lack of regulations governing license revocation hearings as a violation of his due process rights.

On October 2, a telephonic hearing was conducted. Testimony was taken from Whitesides. The hearing was continued until October 24, at which time testimony from the arresting officer and district attorney was taken. On October 25, the hearing officer affirmed the DMV's decision to revoke Whitesides' license for refusal to submit to a breath test. This appeal followed.

II. Standard of Review

This is an appeal of an administrative hearing affirming the DMV's decision to revoke the appellant's driver's license for allegedly refusing to submit to a breath test. Under AS 28.15.166(m), the court may only reverse such a

revocation if it finds that the department misinterpreted the law, acted in an arbitrary and capricious manner, or made a determination unsupported by the evidence. Questions of law are subject to the court's own independent judgment. *Borrego v. State*, 815 P.2d 360, 363 (Alaska 1991). Findings of fact determined by the administrative agency are reviewed under the substantial evidence test. In determining if the findings are supported by substantial evidence, the court reviews such findings to determine if they are supported by "such evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

III. Discussion

Whitesides claims that a number of errors were committed by the hearing officer in the conduct of the administrative hearing as well as her decision to affirm the revocation of his license. This court, for the reasons set forth below, affirms the decision of the hearing officer.

A. Lack of Regulations Argument

Whitesides argues that there are no regulations governing the practice and procedure of administrative license revocation hearings. As a result, Whitesides claims that the department is not empowered to hold such hearings and by doing so they violated his due process rights. Whitesides also argues that he was prejudiced by the lack of regulations which resulted in the denial of his request for an in-person hearing and the tardiness in granting him a hearing.

License revocations based upon failure to submit to a breath test are controlled by AS 28.15.165. *Borrego v. State, Department of Public Safety*, 815 P.2d 360, 363-364 (Alaska 1991). Procedures and practices for carrying out administrative review of DMV revocations are set forth in AS 28.15.166. AS 28.15.166 provides a driver with notice of the revocation, notice of hearing, the rights of confrontation and cross examination, the right to call witnesses, the right to submit documentary evidence, a preponderance of the evidence standard of proof, tape recording of the hearing, and a written decision. These procedures, supplemented with case law, afford a driver due process.

B. Scheduling of the Hearing Argument

Whitesides argues that scheduling his hearing eight months after the revocation denied him a meaningful hearing. The delay, he argues, resulted in a faded memory of the officer who arrested him. It is clear that prior to the revocation of a driver's license in Alaska, licensees are entitled to a meaningful hearing. *Javed v. Department of Public Safety, Division of Motor Vehicles*, 921 P.2d 620, 622 (Alaska 1996). In *Graham v. State*, 633 P.2d 211, 216 n. 12 (Alaska 1981), the court explained that a meaningful hearing "would require the presence of the arresting officer, the production of the report of the arresting officer and any tape recordings, videotapes, or transcripts concerning events surrounding the arrest, and the presence of witnesses having evidence to offer on contested points."

Whitesides was not denied a meaningful hearing because the hearing was held eight months after the

revocation of his license. An administrative hearing is civil in nature and eight months of delay is not uncommon in civil proceedings. Additionally, at Whitesides hearing he had the arresting officer and the district attorney present, the report of that officer, and videotape of his refusal. Whitesides was allowed to fully contest the issues of central importance at his hearing, and was not denied a meaningful hearing because of an eight month delay. *Thorne v. State, Department of Public Safety,* 774 P.2d 1326, 1331 (Alaska 1993).

C. Findings Not Supported By the Evidence Argument

Whitesides argues that the hearing officer's determination that he refused to take the breath test is not supported by substantial evidence. Findings of fact determined by the administrative agency are reviewed under the substantial evidence test. In determining if the findings are supported by substantial evidence, the court reviews such findings to determine if they are supported by "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Borrego v. State,* 815 P.2d at 365.

There is substantial evidence to support the hearing officer's decision that Whitesides refused to submit to the breath test. There was evidence presented that Whitesides was the driver of the vehicle exercising actual physical control of the vehicle.[1] The videotape of his arrest

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[1] It is a requirement of a refusal to submit charge that the person charged must be in actual physical control of the vehicle.

revealed evidence that he would not comply with the officer's repeated requests that he submit a breath sample. The officer's report indicates that he continually refused to submit a breath sample after repeated requests. And, the officer testified that he does not remember Whitesides ever agreeing to submit a breath sample. This constituted substantial evidence that Whitesides refused to submit to the breath test. The Hearing officer found Whitesides' testimony that he did later agree to give a breath sample unconvincing. It is the function of the hearing officer to determine the witnesses' credibility. *Bollerud v. State, Division of Motor Vehicles*, 929 P.2d 1283, 1287 (Alaska 1997). Thus, this court finds that there was substantial evidence to support the hearing officer's determination that Whitesides refused to submit to a breath test.

D. Denial of Request For In-Person Hearing Argument

Whitesides argues that it was an error to deny him an in-person hearing as requested because his credibility was such an important facet of the case and is impossible to assess over the phone. This argument is unpersuasive given that Civil Rule 99, and AS 28.15.166 (e) allow for telephonic appearances of a party or witness in any hearing so long as it does not substantially prejudice the

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Patterson v. Municipality of Anchorage, 815 P.2d 390 (Alaska 1991). However, actual physical control includes sleeping at the wheel while the engine is running. *Jacobson v. State*, 551 P.2d 935 (Alaska 1976).

opposing party.[2] The hearing officer found and this court agrees, holding a telephonic appearance did not substantially prejudice Whitesides.

E. Finding That Appellant was Not Credible Argument

Last, Whitesides argues that the determination that he was not credible was arbitrary and capricious and also not supported by the evidence. Again, for the reasons set forth above it is the hearing officer's job to determine the credibility of those testifying. It is not the job of this court on appeal to reweigh the evidence which lead her to that conclusion. *Sokolowski v. Best Western*, 813 P.2d 286, 293 (Alaska 1991). *See also Snyder v. State*, 930 P.2d 1274, 1281 (Alaska 1996); and *Innes v. Beauchene*, 370 P.2d 174, 177 (Alaska 1962.)

IV. Conclusion

The hearing officer's denial of Whitesides' appeal is affirmed.

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[2] The defendant in *In the Matter of Frederick Triem*, 929 P.2d 634, 642 (Alaska 1996), argued that his due process rights had been violated because the witnesses were allowed to appear telephonically making it impossible to assess their credibility. The court, however, disagreed holding that allowing the witnesses to appear telephonically did not substantially prejudice the defendant. *Id.*

Dated on this 2nd day of October, 1997.

/s/ Michael A. Thompson
Michael A. Thompson
Superior Court Judge

[SEAL]

Sec. 28.05.141. Hearings and appeals. (a) Unless otherwise specifically provided, all hearings required under this title or regulations adopted under this title shall be conducted by the department under regulations adopted by the commissioner governing practice and procedure and consistent with due process of law. Hearings must be informal, and technical rules of evidence do not apply. A person who requests a hearing may retain an attorney. The hearing officer shall be appointed by the commissioner and may be appointed from the department. A hearing officer need not be an attorney, but must be impartial and may not have participated in the decision that is under review. The hearing officer does not have to file a full opinion or make formal findings of fact or conclusions of law, but the hearing officer must state the reasons for the determination and indicate the evidence relied upon. The proceedings at the hearing shall be recorded.

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Sec. 28.15.165. Administrative revocations and disqualifications resulting from chemical sobriety tests and refusals to submit to tests. (a) A law enforcement officer shall read a notice, and deliver a copy of it, to a person operating a motor vehicle, commercial motor vehicle, or aircraft, if a chemical test administered under AS 28.33.031(a) or AS 28.35.031(a) or (g) produces a result described in AS 28.35.030(a)(2); a chemical test administered under AS 28.33.031(a) produces a result described in AS 28.33.030(a)(2); or the person refuses to submit to a

chemical test authorized under AS 28.33.031(a) or AS 28.35.031(a) or (g). The notice must advise that

(1) the department intends to revoke the person's driver's license, privilege to drive, or privilege to obtain a license, refuse to issue an original license to the person, or disqualify the person;

(2) the person has the right to administrative review of the action taken against the person's license or determination not to issue an original license;

(3) if the person has a driver's license or a nonresident privilege to drive, the notice itself is a temporary driver's license that expires seven days after it is delivered to the person, except that if the person was operating a commercial motor vehicle the person will be ordered out of service for 24 hours under AS 28.33.130;

(4) revocation of the person's driver's license, privilege to drive, or privilege to obtain a license, a determination not to issue an original license, or a disqualification of the person, takes effect seven days after delivery of the notice to the person unless the person, within seven days, requests an administrative review.

(b) After reading the notice under (a) of this section, the law enforcement officer shall seize the person's driver's license if it is in the person's possession and shall deliver it to the department with a sworn report describing the circumstances under which it was seized. If the person was operating a commercial motor vehicle, the officer shall order the person out of service under AS 28.33.130.

(c) Unless the person has obtained a temporary permit or stay of a departmental action under AS 28.15.166, if the chemical test administered under AS 28.33.031(a) or AS 28.35.031(a) or (g) produced a result described in AS 28.33.030(a)(2) or the person refused to submit to a chemical test authorized under AS 28.33.031(a) or AS 28.35.031(a) or (g), the department shall revoke the person's license, privilege to drive, or privilege to obtain a license, shall refuse to issue an original license, and, if the chemical test administered under AS 28.33.031(a) produced a result described in AS 28.33.030(a)(2) or the person refused to submit to a chemical test authorized under AS 28.33.031(a) shall disqualify the person. The department's action takes effect seven days after delivery to the person of the notice required under (a) of this section, and after receipt of a sworn report of a law enforcement officer

(1) that a chemical test administered under AS 28.33.031(a) or AS 28.35.031(a) or (g) produced a result described in AS 28.35.030(a)(2), that a chemical test administered under AS 28.33.031(a) produced a result described in AS 28.33.030(a)(2), or that a person refused to submit to a chemical test authorized under AS 28.33.031(a) or AS 28.35.031(a) or (g);

(2) that notice under (a) of this section was provided to the person; and

(3) describing the

(A) circumstances surrounding the arrest and the grounds for the officer's belief that the person operated a motor vehicle, commercial motor vehicle, or aircraft

while intoxicated in violation of AS 28.33.030 or AS 28.35.030; or

(B) grounds for the officer's belief that the person operated a motor vehicle or commercial motor vehicle that was involved in an accident causing death or serious physical injury to another person.

(d) The period of revocation of a driver's license, privilege to drive, privilege to obtain a license, refusal to issue an original license, or disqualification shall be for the appropriate minimum period for court revocations under AS 28.15.181(c) or court disqualifications under AS 28.33.140. A department hearing officer may grant limited license privileges in accordance with the standards set out in AS 28.15.201 to a person whose driver's license or nonresident privilege to drive was revoked under this section. The department may terminate a revocation imposed under this section and issue a driver's license to the person, if the license, privilege to drive, or privilege to obtain a license was revoked for an offense described in AS 28.15.181(a)(5) or (8) and the person meets the conditions set out for termination of a revocation by the court under AS 28.15.181(f).

Sec. 28.15.166. Administrative review of revocation. (a) A person who has received a notice under AS 28.15.165(a) may make a written request for administrative review of the department's action under AS 28.15.165(c) or for limited license privileges under AS 28.15.165(d). If the person's driver's license has not been

previously surrendered to the department, it shall be surrendered to the department at the time the request for review is made.

(b) A request for review of the department's action under AS 28.15.165 shall be made within seven days after receipt of the notice under AS 28.15.165 or the right to review is waived and the action of the department under AS 28.15.165(c) is final. If a written request for a review is made after expiration of the seven-day period, and if it is accompanied by the applicant's verified statement explaining the failure to make a timely request for a review, the department shall receive and consider the request. If the department finds that the person was unable to make a timely request because of lack of actual notice of the department's action or because of factors of physical incapacity such as hospitalization or incarceration, the department shall waive the period of limitation, reopen the matter, and grant the review request. An initial request for limited license privileges may be made at any time. Subsequent requests for limited license privileges may not be made unless the applicant demonstrates a significant change in circumstances.

(c) Upon receipt of a request for review, if it appears that the person holds a valid driver's license and that the driver's license has been surrendered, the department shall issue a temporary driver's permit that is valid until the scheduled date for review. A person who has requested a review under this section may request, and the department may grant for good cause, a delay in the date of the hearing. If necessary, the department may issue additional temporary permits to stay the effective

date of its action under AS 28.15.165(c) until the final order after the review is issued.

(d) A person who has requested a hearing under this section and who fails to attend or appear at the hearing, for reasons other than lack of actual notice of the hearing or physical incapacity such as hospitalization or incarceration, waives the right to a hearing. The determination of the department that is based upon the enforcement officer's report becomes final.

(e) The hearing under this section must be held by telephone unless the hearing officer finds that a telephonic hearing would substantially prejudice the rights of the person involved in the hearing or that an in-person hearing is necessary to decide the issues to be presented in the hearing. An in-person hearing must be held at the office of the department nearest to the residence of the person involved in the hearing unless the department and the person agree that the hearing is to be held elsewhere.

(f) A review under this section shall be held before a hearing officer designated by the commissioner. The hearing officer has authority to

(1) administer oaths and affirmations;

(2) examine witnesses and take testimony;

(3) receive relevant evidence;

(4) issue subpoenas, take depositions, or cause depositions or interrogatories to be taken;

(5) regulate the course and conduct of the hearing;

(6) make a final ruling on the issue.

(g) The hearing for review of action by the department under AS 28.15.165 shall be limited to the issues of whether the law enforcement officer had reasonable grounds to believe that the person was operating a motor vehicle or commercial motor vehicle that was involved in an accident causing death or serious physical injury to another, or that the person was operating a motor vehicle, commercial motor vehicle, or aircraft while intoxicated in violation of AS 28.33.030 or AS 28.35.030 and whether

(1) the person refused to submit to a chemical test authorized under AS 28.33.031(a) or AS 28.35.031(a) or (g) after being advised that refusal would result in disqualification or the suspension, revocation, or denial of the person's license, privilege to drive, or privilege to obtain a license, and that the refusal is a misdemeanor;

(2) the chemical test administered under AS 28.33.031(a) or AS 28.35.031(a) or (g) produced a result described in AS 28.35.030(a)(2); or

(3) the chemical test administered under AS 28.33.031(a) produced a result described in AS 28.33.030(a)(2).

(h) The determination of the hearing officer may be based upon the sworn report of a law enforcement officer. The law enforcement officer need not be present at the hearing unless either the person requesting the hearing or the hearing officer requests in writing before the hearing that the officer be present. If in the course of the hearing it becomes apparent that the testimony of the law enforcement officer is necessary to enable the hearing

officer to resolve disputed issues of fact, the hearing may be continued to allow the attendance of the law enforcement officer.

(i) Testimony given by the person at the hearing is not admissible against the person in a criminal trial unless the person's testimony at the trial is inconsistent with that given at the hearing.

(j) If the issues set out in (g) of this section are determined in the affirmative by a preponderance of the evidence, the hearing officer shall sustain the action of the department. If one or more of the issues is determined in the negative, the department's action shall be rescinded.

(k) If the action of the department in revoking a nonresident's privilege to drive a motor vehicle is not administratively contested by the nonresident driver or if the departmental action is sustained by the hearing officer, the department shall give written notice of action taken to the motor vehicle administrator of the state of the person's residence and to any state in which that person has a driver's license.

(l) [Repealed, § 34 ch 119 SLA 1990.]

(m) Within 30 days of the issuance of the final determination of the department, a person aggrieved by the determination may file an appeal in superior court for judicial review of the hearing officer's determination. The judicial review shall be on the record, without taking additional testimony. The court may reverse the department's determination if the court finds that the department misinterpreted the law, acted in an arbitrary and

capricious manner, or made a determination unsupported by the evidence in the record.

(n) The filing on an appeal under (m) of this section or a petition for review does not automatically stay the department's order or revocation. The court may grant a stay of the order or revocation only upon a motion and hearing, and upon a finding that there is a reasonable probability that the petitioner will prevail on the merits, that the petitioner will suffer irreparable harm if the order is not stayed, and in a case where the petitioner operates a commercial motor vehicle that the public can be adequately protected by conditions imposed by the court.